



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 22, 1996

Mr. James M. Koviak
County Attorney
Brazos County, Texas
300 E. 26th Street, Suite 325
Bryan, Texas 77803

OR96-0384

Dear Mr. Koviak:

You ask whether certain information is subject to required public disclosure pursuant to chapter 552 of the Government Code. Your request was assigned ID# 38390.

The Brazos County Sheriff received an open records request for information relating to the suicide of a county jail inmate. You ask whether the information requested may be excepted from required public disclosure pursuant to sections 552.101, 552.102, 552.103, 552.108, 552.111, and 552.115 of the Government Code.¹

We first address your assertion that section 552.103 of the Government Code excepts all the requested information from required public disclosure. To secure the protection of section 552.103(a), the "litigation" exception, a governmental body must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

Section 552.103(a) requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed

¹In your initial request for an open records ruling, you also raised sections 552.107, 552.109, 552.117, and 552.119. However, as you did not explain how these exceptions applied to the requested information, we do not consider them. See Gov't Code § 552.301(b)(1); Open Records Decision No. 363 (1983).

payments and promises further legal action if they are not forthcoming, *see* Open Records Decision No. 551 (1990), and when a person hires an attorney who then asserts an intent to sue, *see* Open Records Decision No. 555 (1990). You do not argue that litigation is pending or reasonably anticipated. You merely direct us to a letter from the requestor, an attorney, seeking the identity of your insurance carriers. No threat of litigation is made by the attorney in this letter. As you have provided no other information, we conclude that litigation is neither pending nor reasonably anticipated. You may not rely upon section 552.103 to withhold any of the requested information.

We next address your assertion that section 552.101 excepts requested items A, B, E, H, K, L, and M from required public disclosure. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. You state, generally, that these items contain "highly personal and private" information. Section 552.101 incorporates the doctrine of common-law privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

We find no information contained in the information provided to this office that is highly intimate and embarrassing. This office has previously ruled that, generally, the details of an attempted suicide are protected by common-law privacy. *See* Open Records Decision No. 422 (1984) (presumption that details of self-inflicted wound, beyond mere fact that it was self-inflicted, are excepted by common-law privacy may be overcome by demonstration that public has substantial interest in particular incident). However, the right of privacy is personal to an individual and lapses upon his death. Attorney General Opinion H-917 (1976); Open Records Decision No. 272 (1981). Therefore, the information contained in the requested information relating to the suicide and prior suicide attempts by the subject of this request are specifically not excepted from required public disclosure by a common-law right of privacy. We conclude that, with respect to the information submitted to this office for review, you may not withhold any of the requested information under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

We note that requested item A seeks information relating to the arrest and detention of the individual. As responsive to this request, you submitted information relating to a previous misdemeanor arrest, not the information regarding an arrest for aggravated sexual assault which is being sought by the requestor. Therefore, we cannot determine whether any information in the responsive documents is excepted from required public disclosure, under a common-law right to privacy or otherwise. The Texas Open Records Act places upon the governmental body the burden of establishing that information is excepted from public disclosure, including the duty to submit to this office a

copy of the specific information requested, or representative samples if the requested information is voluminous. See Government Code § 552.301(b)(3); Attorney General Opinion H-436 (1974). Consequently, we conclude that, with respect to requested item A, you have not met your burden under section 552.301 and the requested information is presumed public. In the absence of a demonstration that the information is confidential by law or that other compelling reasons exist as to why the information should not be made public, you must release the information to the requestor. Open Records Decision No. 195 (1978). However, because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor, see Government Code § 552.352, we caution you that information which either identifies or would tend to identify the *victim* of sexual assault or other sex-related offense must be withheld under the common-law right of privacy. See Open Records Decision Nos. 393 (1983), 339 (1982). Because we rule that you have not met your burden and that this information is presumed public, we do not address your additional arguments that sections 552.108 and 552.111 except requested item A from required public disclosure.

Likewise, with regard to requested item K, which seeks employment records of officers "in charge that night which indicate they have been previously disciplined for failure to follow policies enacted dealing with the emotionally disturbed and/or suicidal inmates," we note that you submitted documents which do not appear responsive to the request. You state in your response to this request that "[i]f any discipline information was found on any of the [subject] jail personnel," it should be excepted under sections 552.101, 552.102, and 552.111. Under the same rationale as explained above with regard to requested item A, you have not met your burden under section 552.301 and the requested information is presumed public. Moreover, this office has previously held that a common-law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about his performance. See Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). Thus, we conclude that any discipline information regarding any of the jail personnel the subject of the request, to the extent that it exists, must be released to the requestor unless you can demonstrate that the information is confidential by law or that other compelling reasons exist as to why the information should not be made public. Open Records Decision No. 195 (1978). But see Government Code § 552.117 (information that relates to the home address, home telephone number, or social security number, or that reveals whether a peace officer has family members is excepted). As for section 552.102, which is not a discretionary exception, its application to requested item K is discussed *infra*. However, you have waived any argument that section 552.111 excepts any discipline information from required public disclosure, and we do not address it.

We also note that you claim that you cannot find any information responsive to requested item H, which seeks documentation regarding other incidences within the last three years where an inmate has attempted suicide at the Brazos County Jail. The Texas Open Records Act does not require a governmental body to make available information which does not exist. Open Records Decision No. 362 (1983). You state that "[i]f any

information [responsive to requested item H] is found," it should be excepted from required public disclosure under section 552.101. Because you have not submitted to this office any information responsive to this request, we cannot determine whether any exceptions apply. Therefore, we conclude that any information found which is responsive to requested item H is public information which must be released to the requestor unless you can demonstrate that the information is confidential by law or that other compelling reasons exist as to why the information should not be made public, Open Records Decision No. 195 (1978); again, subject to the caveat that the improper release of confidential information constitutes a misdemeanor. Government Code § 552.352. We note that requested item H appears to include all inmate suicide attempts within the last three years, whether successful or not. Thus, as mentioned above, an inmate who had successfully committed suicide would not have a privacy interest in any documentation or information relating to his or her suicide or previous suicide attempts. See Open Records Decision No. 272 (1981). As for any living inmates who had unsuccessfully attempted suicide, we believe that there is a substantial public interest in knowing about suicide attempts by inmates, but not in knowing the inmates' identities. We believe that the privacy interest of those inmates who have unsuccessfully attempted suicide may be adequately protected by withholding information which either identifies or would tend to identify the inmate. Therefore, if or when this information is "found," you must release this information to the requestor, withholding only that information which either identifies or would tend to identify the inmate.

We did find some information in documents submitted in response to requested items K and L which must be withheld because they are documents made confidential by section 552.101 in conjunction with section 5.08(b) of the Medical Practice Act, article 4495b, V.T.C.S. Section 5.08(b) provides that "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician" are confidential. We have marked the information which you may withhold under section 552.101 of the Government Code and section 5.08(b) of the Medical Practice Act.²

We next address your assertion that section 552.102 excepts requested items C, D, E, K, and M from required public disclosure. Section 552.102 protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Thus, only that information which is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and for which there is no legitimate public interest in its disclosure may be withheld. *Industrial Found.* 540 S.W.2d at 685. Having reviewed the documents submitted in response to the above requested items, we can find no information which could be considered highly intimate and embarrassing.

²We note that none of the documents in requested items K and L which we have marked as information that must be withheld appear to be responsive to the request.

Therefore, we conclude that none of the requested information may be withheld under section 552.102 of the Government Code.

We next address your assertion that section 552.111 excepts requested items F, G, J, L, and M from required public disclosure.³ Section 552.111 excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office concluded that section 552.111 excepts from required public disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* at 5. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* We do not find any information which consists of advice, recommendations, opinions, or other material which reflects the policymaking processes of the governmental body. Consequently, you may not rely on this exception to withhold any of the requested information.

With regard to requested item J, which seeks documentation relating to "[a]ny policies, verbal or written, that have been enacted since the suicide of [the requestor's] client," you submitted a single page of handwritten notes indicating that the response to requested item J includes "color coded check sheets" and a "training class." However, you did not provide this office with any documentation implementing the new policy of using color coded check sheets or any documentation regarding the training class you conducted. We again must conclude that you have not met your burden under section 552.301 because you have failed to provide this office with copies of the specific information requested. Therefore, the requested information is presumed public. In the absence of a demonstration that the information is confidential by law or that other compelling reasons exist as to why the information should not be made public, you must release the information responsive to requested item J to the requestor. Open Records Decision No. 195 (1978).

In response to requested item N, which seeks the subject's death certificate, you state that no death certificate is currently available and, alternatively, raise section 552.115. A document is not within the purview of the Act if, when a governmental body receives a request for it, the document does not exist. Open Records Decision Nos. 476 (1987), 452 (1986). Therefore, you need not respond to this request.

Finally, with regard to requested item I, which seeks documentation and information relating to "[a]ll incidences where an inmate has successfully committed suicide in the Brazos County Jail over the past three years," you state that the information

³ With regard to requested item G, you state that it is the same information as that submitted in response to requested item F.

requested is "not sufficiently specific."⁴ If the Brazos County Sheriff's Office truly feels that the request is "not sufficiently specific," it must make a good faith effort to relate the request to information which it holds. Open Records Decision No. 561 (1990). The Brazos County Sheriff's Office should inform the requestor of the kinds of information available to assist the requestor in narrowing the request, if necessary, *see* Open Records Decision No. 87 (1975) at 3, and should ask for clarification if it cannot reasonably understand a request. Open Records Decision Nos. 304 (1982), 23 (1974).

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal line extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/ch

Ref: ID# 38390

Enclosures: Marked documents

cc: Mr. Kyle A. Davis
Attorney at Law
P.O. Box 471
Bryan, Texas 77806
(w/o enclosures)

⁴We note that, in response to this request for information, you provided this office with a single page of handwritten notes indicating that the response to requested item I may pertain to two named individuals, one of whom, according to other information supplied to this office which we have determined is not excepted from required public disclosure, successfully committed suicide at the Brazos County jail just three days prior to the suicide by the subject of this request. We suggest that the requestor may be seeking documentation relating to these two individuals' suicides, and to any other successful suicides committed in the Brazos County jail in the past three years.